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In The

Supreme Court of the United States

October Term, 1975

No. 75-1590

ORLANDO MIRANDA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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I. This Court should grant certiorari and thereafter should reverse the judgment of conviction and dismiss the indictment on the grounds that the prosecution inexplicably failed to account for a tape recording of an essential conversation made on March 25, 1974, upon which the entire case turned. This prejudice was exacerbated by the fact that the Government deliberately and intentionally withheld from the defense any notice of the fact that a tape had at one time allegedly existed of this crucial conversation. The conversation of March 25, 1974, therefore, should have been suppressed as requested

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by the petitioner. This Court should act not only upon the legal principles involved, but also in its supervisory capacity to insure justice in the federal courts. 20

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In The

Supreme Court of the United States

October Term, 1975

No.

ORLANDO MIRANDA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT[1]

1. The docket number of the case in the Second Circuit was 74-2651.

STATEMENT

Petitioner, Orlando Miranda, respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its affirmance of the judgment of the United States District Court for the Eastern District of New York, which convicted the defendant-petitioner of a narcotics violation (21 U.S.C. §841(b)(1)(A) and §812), after trial before Judd, D.J., and a jury. The court had sentenced petitioner to concurrent terms of six years imprisonment. A petition for rehearing and reconsidereation was denied on April 8, 1976.

OPINION BELOW

The opinion of the Second Circuit is reproduced as an appendix to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The United States Court of Appeals for the Second Circuit affirmed the judgment of conviction on December 3, 1975, and denied a petition for rehearing and reconsideration on April 8th, 1976. (These orders are annexed hereto as appendices.)

QUESTIONS PRESENTED

1. Whether the prosecution's grossly negligent, or deliberate loss of a tape recording allegedly made by a cooperating informer, of a crucial conversation between petitioner and herself, and the Government's subsequent suppression of this fact from the defense, deprived petitioner of a fair trial under the Fifth Amendment and violated *Brady v. Maryland*, 373 U.S. 83 and the Jenck's Act (18 U.S.C. §3500)?

2. Since the case at bar occurred after *United States v. Bryant*, 448 F.2d 1182 (D.C. Cir. 1971), should not this Court resolve the conflict between the *Bryant* case and the case at bar by ordering a reversal of the conviction herein?

3. Whether the Government conducted a "trial by ambush" by suppressing the identities of two important witnesses, "Georgie" and "Toni", who had accompanied the informer to several meetings with the petitioner, and then belatedly revealing the identity of only one, "Georgie", toward the end of the trial (Fifth Amendment)?

4. Whether petitioner was denied a fair trial by the refusal of the Government's main witness, Gloria Rodas, to reveal the identity of "Toni", and the refusal of the trial court and prosecutor to compel this disclosure by use of the contempt power (Fifth and Sixth Amendments)?

5. Whether petitioner was denied a Sixth Amendment right of confrontation by the actions of the prosecutor and the court in depriving him of the right to confront and cross-examine

"Toni" and by diminishing and emasculating his opportunity to cross-examine "Georgie" (Fifth and Sixth Amendments)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth and Sixth Amendments of the United States Constitution, as well as 21 U.S.C. §841(b)(1)(A) and §812 are involved herein.

THE CASE CONSIDERED

We submit that the facts and circumstances of the case at bar are shocking to a point that this Court should not only reverse because of the legal errors involved, but also in its supervisory capacity over the conduct of trials in federal courts.

The petitioner herein, who had never previously been convicted of any crime, was in effect tried by "ambush".

The government alleged that a cooperating informer by the name of Gloria Rodas, also known as "Beba", had recorded a conversation between the defendant-petitioner and herself on March 25th, during which occasion the petitioner allegedly discussed narcotics and passed money to "Beba" in exchange for same. This conversation supposedly was broadcast and recorded by federal agents in a nearby automobile.

During pretrial discussions and, indeed, during the trial itself, the Government never revealed the existence of this tape. On the contrary, the trial prosecutor informed the defense

attorney, a former Executive Assistant United States Attorney himself, that he had been given all of the tape recordings and transcripts thereof.

As it turned out, during the questioning of a witness after the Government's case had proceeded for quite some time, the defense counsel unexpectedly came across the fact that apparently a tape recording had been made by Rodas of this crucial conversation, the only one where criminality had been etched into a tape. Other than the testimony of Rodas, there was no direct evidence of criminality, save for that alleged tape.

The agents who were listening in another automobile could not speak Spanish or understand it, with the exception of one agent who claimed that he too had heard the incriminating conversation. No one, however, was able to tell what had happened to this most crucial tape. Its loss was neither revealed nor explained[2] until the trial defense attorney incredulously stumbled across the fact of its existence. There was never any satisfactory explanation to what had happened to this lost or destroyed tape recording.

The Court must bear in mind that Orlando Miranda took the stand himself and categorically denied that he had ever been involved in narcotics and absolutely refuted the testimony of Rodas that he had ever engaged in any narcotics transactions with her or anybody else.

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2. No explanation of the disappearance of the tape was ever made. Even the trial court found the Government was negligent. We maintain the Government was irresponsible in this matter.

To exacerbate the situation further, and to deepen the mystery of the unexplained loss or spoliation of evidence by the Government, another tape recording was allegedly made by Rodas several days later when the balance of money was to be paid for the narcotics which had allegedly been transferred on March 25th. At that time the second tape recording was not lost, but the portion which allegedly related to the incriminating activities of the defendant-petitioner was somehow inaudible.[3] Thus, the tape of the subsequent transaction was also worthless so far as criminality was concerned.[3] No one could explain how only that portion of the tape was obliterated or inaudible. Thus, nothing corroborative exists on any tape.

During the trial itself, the Government refused to reveal the identities of two women, "Georgie" and "Toni", who had accompanied Rodas on several occasions when she met the defendant-petitioner. Toward the end of trial, the prosecutor reluctantly revealed the identity of "Georgie" and stated that the defense could interview her. She had been arrested and charged with a narcotics violation and the court warned defense counsel that he could not bring out her background. Defense counsel declined to use her because of inadequate time to prepare for this witness who had been withheld from him all this time.

The court, however, refused to compel Rodas to identify "Toni" and also declined to compel "Georgie" to do so. In other words, although Rodas took the stand and testified against the defendant-petitioner, she was immune from any discipline by the

3. *Cf.* Eighteen minute gap in Nixon tapes by Rosemary Woods.

court or prosecution for her wilful refusal to divulge this most important information. The court, for some reason, did not seek to invoke its contempt power, nor did the prosecution ask it to do so. As a result, of course, a crucial witness could not be located by the defense and would not be produced by the prosecution. A serious violation of the Sixth Amendment right of confrontation was therefore perpetrated.

Agent Castillo, who allegedly had heard the conversation between petitioner and Rodas when the latter recorded it and broadcast it on the 25th of March, for some strange reason made no notes of this fact.[4] Therefore, he could not even produce notes corroborating what he claimed he recollected. This was another suspicious and unusual circumstance of this case.

Gloria Rodas, also known as Gloria Jackson, also known as "Beba", revealed that she had been cooperating with the Government following her arrest and conviction of a drug conspiracy based upon her plea of guilty (10, 11).[5]

Rodas disclosed that she knew the petitioner Orlando Miranda and also knew him by a nickname of "Manolo" (11).

She said that she met certain DEA agents on February 28, 1974.

4. Is it conceivable that no notation of the most incriminating event in the case should not even warrant a notation?

5. Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated.

Over objection, the court permitted a conversation, to which the petitioner was not a party, between Rodas and certain agents, wherein she agreed to go to the Jaguar Lounge which was operated by Miranda (13, 14).

She stated that she met Agents Schnackenberg and MacMullen (14), who worked with her in undercover activities.

On March 1, 1974, at about 10:30 P.M., Rodas went into the Jaguar Lounge in Queens and met a person by the name of "Jack", who in turn introduced her to "Manolo", the petitioner (14, 15).

On March 4, 1974, "Beba" agreed to go back to the Jaguar Lounge and it was she who brought up the subject of drugs (16, 17).

Petitioner said a friend of his was coming out of jail and allegedly asked her in how much was she interested. When the petitioner was told that she was interested in a kilo, he told her that he would let her know (17-19).

On March 21, 1974, "Beba" returned to the Jaguar Lounge and saw the petitioner again. On this occasion, she claimed that Miranda told her that he had been in the drug business for a long time and could possibly arrange to sell her drugs (19, 20).

The court, incidentally, permitted Agent Schnackenberg to remain in the courtroom during this interrogation, over the objection of the defense counsel (22).

The witness, Rodas, testified that again she met petitioner on the 22nd of March, 1974, at 10:30 P.M. at the Jaguar Lounge. On this occasion, she stated that he told her she could have ten and a half ounces of cocaine at $1,000 an ounce (24, 25).

Petitioner allegedly said that he was interested in a partnership and was giving her extra value (25).

On March 25, 1974, Rodas recalled that she went to the DEA headquarters on 57th Street and was given $6,000 in cash, and was equipped with a transmitter. She was also searched on this occasion (26, 27).

Rodas went to the Jaguar Lounge and later agreed to drive the petitioner to a garage where his car was being repaired (29, 30). She had in her car an attache case containing $6,000. She allegedly told him to open the case and claimed that at this time he removed the $6,000 and put white powder in the suitcase (29-31).

Rodas asserted that she spoke with the petitioner in Spanish (31).

Allegedly the petitioner agreed to give her $10,000 worth of drugs although she only had $6,000 in cash with her, reaching the understanding, however, that she would give him the balance shortly (30-32).

On April 2, 1974, the agents again equipped Rodas with a transmitter, searched her, and gave her $4,000 in cash. On this

occasion she said she went to the Jaguar Lounge and went downstairs to the kitchen where she gave petitioner the balance of $4,000 (33-35).

The court permitted the testimony beyond the period of the indictment, over objection of defense counsel. Thus, Rodas was permitted to state that on April 19, 1974, she again met the petitioner at the Jaguar Lounge and on this occasion had additional conversations with him (36-40).[6]

The agents concocted a plan to have another agent from Puerto Rico, by the name of Octavio, pose as the brother of the witness Rodas. In this guise, the agent Octavio, Rodas, and the perennial "Georgie" and "Toni" met together with Miranda at a bar and exchanged pleasantries. Octavio allegedly thanked the petitioner for being nice to his sister, meaning "Beba". Nothing whatsoever was said alluding to drugs. We submit that the conversation was completely sterile so far as drugs were concerned (41-45).

The court refused to permit defense counsel to obtain the name of a brother who was supporting Rodas (48, 49). In addition, the court stated that defense counsel could not elicit the name of the other woman at the meeting, nor their addresses (55, 56).

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6. It should be noted that the court instructed the jury that this testimony, beyond the period of the indictment, was solely for the purpose to establish intent and could not be used to convict the defendant. We maintain that this was a completely meaningless and confusing statement to make to laymen jurors. *Bruton v. United States*, 391 U.S. 123.

Rodas declared that the other woman was "Georgie" who was also convicted of a drug violation and apparently was cooperating with the Government (58, 59). At this point, at a side bar, the Government revealed that the name of this individual was Maldonado (58, 59).

The other woman was named "Toni" and had never been convicted of a crime. This was the only information that was imparted to defense counsel at this time (58-63).

Rodas, despite the fact that she was on the stand testifying without any restraint, refused to state where "Toni" worked, stating it would be perilous. She stated that "Toni" was a friend of hers. The Government objected to any attempt to elicit this information and the court went along with the Government's objection, despite the fact that the petitioner was facing 15 years in prison (63, 64).

It is significant to note that Rodas declared that she always met "Toni" in the bar when she met the petitioner. "Georgie" was there as well on virtually every occasion (74-80). It should therefore be noted that these two individuals were witnesses to essential portions of this investigation and were not merely window-dressing.

The court warned defense counsel that it could not go into the background of "Georgie" and also cautioned him not to say anything further concerning "Toni" (83, 84).

It should be noted that defense counsel objected on the grounds that while Rodas was searched by the Government, there was no evidence that "Georgie" or "Toni" had been

searched, and it might well be that the funds allegedly given to petitioner were given to these individuals, and perhaps these individuals gave the drugs to Rodas which were ultimately turned over to the Government (83-85).

The defense elicited the fact from Rodas that on March 23 and March 25, 1974 she had been equipped with transmitters. The defense insisted that it be given the tapes of the conversation on March 23rd and the other one on March 25th (94, 95). The Government's counsel, however, said that Mr. Todel, the defense counsel, had heard all the tapes. What it did not say was that the tape of March 25th was just not accounted for. It never told defense counsel that apparently the Government had lost, or might even have destroyed, that tape. That tape was the most important piece of corroborative evidence in the entire case since the only transaction where there might have been corroboration of the witness Rodas, was inexplicably missing.

It is also significant that "Toni" and "Georgie" were in the Jaguar Bar on March 25th and could have received the funds from the witness Rodas and might very well have turned over narcotics to her to be given to the Government (99, 100). Only Rodas had been searched (138, 139).

On March 23rd, 1974, she, that is "Beba", already knew that she was going to meet the petitioner on March 25th with respect to the alleged drug transaction. Thus she had plenty of time to make any preparations she wanted.

Ironically, on April 2, 1974, when $4,000, according to "Beba", was turned over to the petitioner in the kitchen of his

lounge, another recording was allegedly made. This, however, did not pick up any part of the conversation wherein allegedly the witness Rodas gave Miranda the additional $4,000, representing the balance of the money for the drugs which she had allegedly received from him on the 15th of March, 1974 (104, 105).

Agent Schnackenberg of the DEA stated that on March 25, 1974, he gave Rodas $6,000 in United States currency and equipped her with a transmitter. She was also searched at this time (113, 114).

He testified that he, Agent Castillo, and other agents were in another automobile following a car in which the petitioner and "Beba" were riding on the 25th of March. Only Agent Castillo could understand the Spanish language among the agents who were surveilling in the other car. The conversations between "Beba" and Miranda were allegedly recorded but Schnackenberg admitted that he had no idea what had happened to these recordings (117-126).

Schnackenberg merely stated that he doesn't know where the tape of March 25th was and doesn't know who has it or if it exists (137).

He also conceded that on March 25th, "Georgie" went to the Jaguar Lounge together with Rodas, but that "Georgie" was not searched (138, 139).

In addition, he stated that "Toni" was there but that she was not searched either (139).

Agent William MacMullen, testified that he was Supervising Agent for the DEA in charge of this investigation.

He, too, stated that on March 25, 1974, he equipped the witness Rodas with a Kel transmitter and gave her $6,000 in cash (151).

Agent Castillo, who alone understood the Spanish language, and other agents, surveilled the meeting between the defendant and Rodas.

The court permitted the Government to ask "why" questions, thereby permitting the witness MacMullen to give the operation of his mind on direct examination (163-167).

MacMuller stated that he, too, had no idea whatsoever of what had happened to the tapes of March 25th (167, 168).

It should be noted that defense counsel tried to elicit the fact that certain coercion was used on the defendant when he was arrested, but the court would not permit adduction of this evidence (176).

Octavio Pinol, a DEA agent stationed in Puerto Rico, testified that he had a conversation with the petitioner when he posed as Rodas' brother. There was no actual conversation concerning narcotics (186-191). The court, it should be noted, permitted inferences upon inferences (196).

Agent James Castillo testified for the Govermment and stated that he overheard the conversation and recorded it on

March 25th. He, too, could not account for what happened to the tape of this important conversation between Miranda and Rodas. The tape, he stated, was apparently lost (205-207).

The court, it should be noted, stated that the Government was, at the very least, "negligent" (207, 208). Nonetheless, it permitted testimony concerning the conversation (207, 208, 214, 215).

Agent Castillo said that he made no notes whatsoever of this conversation wherein the petitioner allegedly stated that he was giving $10,000 worth of cocaine to Rodas in exchange for $6,000, but that he would expect the balance to be paid by her later since he could not break up the allotment (214-218).

Ironically, Castillo admitted that he too, had never made a memorandum of this conversation. In addition, he stated that petitioner told him when he was arrested that he was completely innocent and that he was not involved in drugs at all (224). In addition Miranda stated that he wanted an attorney (224).

When Edward Manning, an agent who made a chemical analysis of the drugs, came to testify, defense counsel objected on the grounds that the drugs had never been identified by the witness Rodas (237).

At this late juncture, it should be noted that the Government stated, outside the presence of the jury, that it would now make Iris Maldonado, the alleged "Georgie", available to defense counsel. Defense counsel insisted upon a continuance, but the court denied this (239).

The other important witness, "Toni", was not, however, made available, nor could her whereabouts be determined by the Government. At least that it what the Government said (241).

The court below itself noted that "Georgie" was being made available very late in the trial and that "Toni" was not being made available at all. It denied, however, any motion to dismiss which was made by the defense counsel (253, 254, 262, 263, 264-268).

The record reveals that neither Rodas nor "Georgie" would tell where the important witness "Toni" was. In addition, they would not give her address (267, 268).

The Government, despite the fact that it obviously had plenty of leverage over these individuals, used none of it to aid the defense in its important quest for these witnesses.

THE DEFENSE

Defendant-petitioner Orlando Miranda took the stand in his own behalf. He stated that he had been born in Cuba and came to the United States in 1956. He testified that he lived with his mother, father, two brothers and a daughter aged 11. He was not living with his wife but had been awarded custody of his daughter (271-273).

Miranda asserted that he operated the Jaguar Lounge in Queens County near Shea Stadium and held a 51% interest in the company.

He recalled that he met Gloria Rodas, whom he knew as "Beba", in March of 1974, together with her two "sisters", "Georgie" and "Toni". The petitioner remembered that "Toni" *always* accompanied Rodas when she came to visit him (274-276).

"Beba" mentioned the possibility of a partnership and said she could arrange to have a striptease act in his bar, but petitioner asserted that he was not interested and told her so (275-277).

The petitioner declared that on one occasion he met "Toni", "Georgie", and the witness Rodas at a bar known as "Las Fuentes Espanola". Exhibit B of the petitioner depicts the photograph that was taken there of these people, including the petitioner (278, 279).

On one occasion petitioner recalled that he had an automobile accident and "Beba" and her two sisters came over. At this time he requested that "Beba" drive him to the auto shop so he could pick up his car and she agreed to do so (278-281). In the car, "Beba" asked petitioner to pick up a case, actually an attache case. Petitioner saw a white powder inside and stated that he wanted nothing to do with it. He did not at any time receive any money from "Beba" (280-282).

He asserted that he had not told "Beba" that he intended to go to Puerto Rico, as she had reported, and, as a matter of fact, stated that he had last been in that territory about fifteen months previously (281, 282).

Petitioner recalled that on one occasion he was introduced to a person described as the "brother" of "Beba" (282). This was the agent, Octavio.

Miranda declared that he told "Beba" he was not interested in and did not want cocaine, although she told him that her "brother" had cocaine (282).

Following his arrest on May 31, 1974, Miranda asserted that United States agents of the DEA tried to recruit him as an informer (283, 284).

He denied any involvement in drugs and was threatened that he would be hit by the agents. He refused to cooperate with them since he claimed he was not involved in any way, shape or form and, accordingly, the arrest was processed (283-285). He had no criminal record. He was told by one agent that he would have problems if he didn't cooperate (285).

The clear import of Miranda's testimony was that he was *framed* in this case (285, 286). Had the recordings or Agent Castillo's notes been produced, this might have been refuted. As it stands, only the recollection of interested witnesses survives. Why did the Government suppress these facts?

While Miranda conceded that he had several meetings with "Beba" and her "sisters", he categorically denied that he was ever involved in drugs (288-294).

On March 25, 1974, he conceded that he was in an automobile with Rodas, but denied absolutely that he had ever

offered to sell her any cocaine. He stated he received no money at all on that occasion. He denied involvement in drugs and insisted that he told "Beba" he didn't want to deal in anything of that sort. He absolutely contradicted the testimony of Rodas and Agent Castillo who had testified to the alleged conversation in that car (304-307).

The Government insisted that "Georgie" was equally available to the petitioner since at the virtual close of their case they had mentioned her name and permitted defense counsel to interview her. Defense counsel however stated he needed a continuance to conduct an investigation before he could determine whether or not to use this witness, but the court denied such continuance, as we have already indicated. The court noted that while "Georgie" was made available, it was quite late in the trial and "Toni" was never produced at all. "Toni" was a name which was not really meaningful, especially since both "Georgie" and Rodas refused to give the correct name of this individual (341, 342).

The trial court stated that it would not give a missing witness instruction despite the fact that the Government had certainly acted improperly in this case in withholding the information about these witnesses (344).

REASONS FOR GRANTING THE WRIT

I.

This Court should grant certiorari and thereafter should reverse the judgment of conviction and dismiss the indictment on the grounds that the prosecution inexplicably failed to account for a tape recording of an essential conversation made on March 25, 1974, upon which the entire case turned. This prejudice was exacerbated by the fact that the Government deliberately and intentionally withheld from the defense any notice of the fact that a tape had at one time allegedly existed of this crucial conversation. The conversation of March 25, 1974, therefore, should have been suppressed as requested by the petitioner. This Court should act not only upon the legal principles involved, but also in its supervisory capacity to insure justice in the federal courts.

One of the most disturbing and prejudicial aspects of this case lay in the fact that the Government apparently deliberately suppressed from the defense the fact that a tape recording of the most crucial conversation in the entire case, that is the conversation of March 25, 1974, between Rodas and the petitioner wherein he allegedly gave her ten ounces of cocaine in exchange for $6,000 was lost or destroyed. The prosecution rather "cutely" stated that all the tape recordings which it had, had been turned over to the defense. It was only during the trial proper that for the first time on cross-examination, the defense learned that a tape recording had allegedly been made of this important March 25th meeting.

We submit that this was clear spoliation of evidence, or at least such gross negligence as to warrant a reversal and dismissal of the indictment, irrespective of any other error in this case. [*United States v. Bryant*, 448 F.2d 1182 (D.C. Cir.). See also, *United States v. Perry*, 471 F.2d 1062, 1065; and *United States v. Ferguson*, 498 F.2d 1001 (D.C. Cir. 1974).]

It should be noted that the Government offered no excuse nor any explanation whatsoever for the loss of this essential tape. There was no "good faith" explanation by the prosecution as to why the tape was not available, nor was there any cogent explanation proffered as to what efforts were made to locate it.

More significant than the foregoing, however, is that the Government withheld any information about the tape from the defense until the middle of the trial when, by sheer luck, defense counsel became aware of the fact that "Beba" had been wired up. Even the reports of the agents omitted any references to the tape or that it was missing.

The maxim *"Contra spoliatorem omnia praesumuntur"* requires that there must be a presumption that evidence which has been destroyed or negligently lost would have been unfavorable to the spoliator (1 Smith, Lead. Cas. 315).

In *Kolod v. United States*, 390 U.S. 136, at 137-138, the United States Supreme Court indicated that *ex parte* determinations that evidence would have been duplicative or irrelevant are impermissible.

The argument in *Kolod* cogently noted:

> "When a government winces at full disclosure in cases such as this it is a government that has lost its taste for freedom."

See also, *Katz v. United States*, 389 U.S. 347, and *Berger v. New York*, 388 U.S. 41.

In *United States v. Bryant, supra,* the District Court of Appeals made it abundantly clear that preservation of tape recordings involved in criminal investigations are absolutely essential and, indeed, the court quotes the Director of the Federal Bureau of Investigation who ordered that *"These tapes should be preserved for ten years in the same manner as documentary evidence." (Bryant,* 448 F.2d at 1184).

In the *Bryant* case, *supra,* the Court of Appeals affirmed apparently on the principal ground that the District Court had found that the tape in question was almost entirely unintelligible. The court, however, noted *(Id.* at 1184):

> "The lost tape here had major potential importance to the question of guilt or innocence, since it might have enabled appellants to contradict the testimony of the undercover agent involved in the narcotics transaction. It developed on remand, however, that the Bureau agents had played the tape and found it to be almost entirely unintelligible. The District Court credited the agents' testimony in this regard and concluded that the tape would have been of little use to appellants. There is nothing in the record

> which could justify our rejection of that conclusion. *In the future, of course, investigative agencies will not be allowed to excuse nonpreservation of evidence by claiming that it contained nothing of interest to defendants."* (Emphasis ours.)

In the case at bar, however, the contrary is true. The Government, by its own agents, declared that the tape herein was one of the clearest and most intelligible of any tapes. As a matter of fact, it is the only tape that was ever made where supposedly something incriminating was uttered. The Court will recall that the portion of the April 2nd tape, which supposedly referred to the $4,000, representing the balance for the drugs in question which was allegedly given to Miranda, for some strange reason was unintelligible.

As the court in *Bryant* points out, the lost tape had "major potential importance to the question of guilt or innocence, since it might have enabled appellants to contradict the testimony of the undercover agent involved. . . ."

In *United States v. Perry,* 471 F.2d 1057 (D.C. Cir. 1972), the Court of Appeals indicated that where "earnest efforts" are made to preserve crucial materials and "to find them once a discovery request is made", there are possibilities for avoidance of the *Bryant* rule.

In the case at bar, however, even the trial judge felt that the Government had been negligent.

The concurring opinion, however, of Judge Skelly Wright (471 F.2d at 1068) notes that the *Perry* case involved a situation where the material was lost *prior* to the court's decision in the *Bryant* case and that therefore *Bryant* was unaffected by the *Perry* decision. *(Cf. United States v. Bryant,* 439 F.2d at 652).

It should also be noted that in the *Perry* case the court was not dealing with a lost tape. The case nevertheless recognized that where negligence is involved, the *Bryant* rule must be invoked.

In *United States v. Ferguson,* 498 F.2d 1001 (D.C. Cir. 1974), the court considered the fact that a Government informant who was present during a narcotics transaction was not available for the trial. The Court of Appeals, however, distinguished *Ferguson* from *Roviaro v. United States,* 353 U.S. 53, noting that in *Roviaro* the Supreme Court was concerned with the withholding of an informant's identity and in his failure to testify at trial (353 U.S. at 62). The *Ferguson* court further noted that in *Roviaro* the Supreme Court was dealing with the withholding of an informant's identity and in his failure to testify at trial (353 U.S. at 62).

The *Ferguson* court further noted that in *Roviaro* the "informant was an integral part of setting up the crime [353 U.S. at 64] and the court found that in the absence of other witnesses, was the only means by which the appellant could explore any possible entrapment by the Government."

In *Ferguson,* however, the Court of Appeals noted that the Government represented to the court that the informant would

appear as a witness for the Government and that his identity was being withheld for reasons of his safety (498 F.2d at 1004).

The court further noted in *Ferguson* that ten days before trial the Government did reveal the identity of the informant and "disclosed further that the Government had lost touch with him". (*Id.* at 1004).

In *Ferguson* the Court of Appeals distinguished inanimate objects, such as recordings, from live witnesses. Thus at 1005 of 498 F.2d, the Court of Appeals explained:

> "This Court called upon the government to provide procedures for the safeguarding of such Jencks material and held that in the future unless such procedures were established so that discoverable evidence might be preserved, sanctions for nondisclosure will be invoked. The spirit of *Bryant,* the dissent says, should be applied to the clearly distinguishable situation with which the Court is confronted in the instant case. We disagree. It is one thing to safeguard such inanimate objects as recordings of conversations. It is quite another to require that government witnesses be secured for the purpose of a future trial. Witnesses, like defendants released on bond, do disappear."

At page 1006 of the *Ferguson* opinion the court, referring to *Bryant* and *Perry,* further elucidated:

> "In *Perry*, we said, respecting *Bryant*, that 'even though Jencks Act information has been lost or destroyed criminal *convictions* otherwise based on sufficient evidence *may* be permitted to stand so long as the Government made *"earnest efforts"* to preserve crucial materials and to find them once a discovery request is made.' (Footnote omitted; emphasis in original)."

This Court should take cognizance, therefore, that in all of the foregoing cases, *Bryant*, *Perry*, and *Ferguson*, the elements of lack of prejudice were obvious and with the exception of *Bryant*, good faith efforts on the part of the Government had been made.

In the trial court, however, there was obviously an effort made, deliberately, to withhold from the defense the very knowledge that a tape had ever existed.

This, therefore, was certainly a case where "trial by ambush" was the rule of the day, as will be further explained in the next point as well. [*United States v. Baum*, 482 F.2d 1325, 1332 (2 Cir. 1973)].

This Court has supervisory powers over the conduct of trials in federal courts. What has occurred in the case at bar cannot help but shock the conscience of this Court.

It is respectfully submitted that in such cases as *Mesarosh v. United States*, 352 U.S. 1 (1956), this Court made it abundantly clear that it would not permit such conduct. See *Brady v.*

Maryland, 373 U.S. 83; *Giglio v. United States*, 405 U.S. 150; and *Lee v. Florida*, 392 U.S. 378.

It should also be noted that in the court below, the opinion, Slip 6561, indicates that the April 2nd, 1974 recording was unintelligible. Appellate counsel had been advised by trial counsel that this was not entirely correct since portions of the April 2nd conversation were clear. The only portions apparently unintelligible allegedly related to the supposed criminal activities. It is very strange that only the incriminatory portion should have been unintelligible.

Rodas alone testified that "Toni" and "Georgie" were not present when she had conversations with Miranda concerning narcotics. We only have Rodas' testimony for this. The petitioner contradicted this assertion, but no opportunity was ever given to substantiate his position since he could not learn the identities of "Georgie" and "Toni" early enough. When he finally did learn the identity of "Georgie", the trial was nearly over and it was impossible to properly prepare to examine such a witness. It must be remembered that Gloria Rodas and "Georgie" had both previously been arrested and convicted by the Government. Both had strong motives to lie. Proper preparation was obviously necessary before putting such a witness on the stand.

"Toni", however, was never produced nor identified, despite requests and despite the fact that the witnesses, Rodas and "Georgie", were asked to identify "Toni" and refused. No effort to use its contempt power was made by the court, nor did the Government seek to have the court utilize it.

It is therefore submitted that essential right of confrontation was denied to the petitioner. (See Sixth Amendment, United States Constitution, and the next point.)

This Court should resolve the conflict between *Bryant, supra*, and the case at bar.

II.

The Government withheld the identity of "Georgie" and "Toni" from the defense despite the fact that both of these women were present at virtually all of the conversations with the petitioner concerning drug transactions. The belated revelation of "Georgie's" full name toward the close of trial was worthless and frustrating since the trial court refused to grant a continuance to permit defense counsel to properly confront this witness.

The trial counsel in this case, a former Executive Assistant United States Attorney, Mortimer Todel, Esq., must have had feelings of *deja vu* while trying this case since he was the same trial counsel as the one who tried *United States v. Baum, supra,* where the court below reversed the conviction and condemned the Government for withholding the identity of a witness until the virtual end of the trial *(United States v. Baum,* 482 F.2d at 1331).

Mr. Todel quite correctly asked for a continuance, as the court below indicated was warranted in the *Baum* case, when the Government belatedly identified "Georgie". "Georgie" was not some casual, cumulative witness, but, on the contrary, had been

present at crucial conversations involving the very essence of the case. Moreover, if anything smacked of a "trial by ambush" it was the case at bar. Thus, in *Baum*, the court below explained:

> "The failure to reveal Greenhalgh's identity until he was presented as a witness, confronted the trial judge with the hard choice of interruption of the trial or denial to the defense of a reasonable opportunity of meeting the severe impact of this aspect of the prosecutor's evidence. Such tactics were condemned, and called for the reversal in United States v. Kelly, 420 F.2d 26, 29 (2d. Cir. 1969). In the language of Judge Smith *'The course of the government smacks too much of a trial by ambush, in violation of the rules.'* To be sure, Baum's attorney did not make a very forceful showing in the district court of what cross-examination or rebuttal material he could secure. But in a case so close as this, we would rather give the defendant the benefit of the doubt than let the Government reap even a slight possibility of benefit from what we regard as a lack of candor unworthy of a prosecutor.
>
> Here, no reason for nondisclosure was advanced by the government. Greenhalgh's testimony was crucial to the prosecution; it was equally crucial to the defense. Cf. Roviaro v. United States, 353 U.S. 53, 60, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); United States ex rel Wilkins, 326 F.2d 135, 140 (2d Cir. 1964)" (emphasis ours).

Moreover, there was no reason whatsoever advanced why the identity of this witness could not have been revealed earlier in the trial or, for that matter, immediately before trial, under a proper protective order, as is done time and again in criminal cases.

In addition to the foregoing, the Government obviously made no efforts whatsoever to assist the defense in obtaining the identity of "Toni" who, undoubtedly was also present at many important conversations and who would have been an essential witness since she could have corroborated or contradicted Rodas' testimony. The Government promulgated the impression that it had no control over Rodas and "Georgie".[7]

The defense, therefore, was deprived both of an essential right of confrontation, and also of the ability to subpoena witnesses in his behalf in violation of the Sixth Amendment of the United States Constitution and was thus deprived of due process of law under the Fifth Amendment.

In *Smith v. Illinois,* 390 U.S. 129, 132, the Supreme Court restated:

> "In *Alford v. United States,* 282 U.S. 267, this Court almost 40 years ago *unanimously reversed* a Federal conviction because the trial judge had sustained objections to questions by the defense counsel seeking to elicit 'the place of residence' of a prosecution witness. . ." (emphasis ours).

7. Rodas denied "Georgie" and "Toni" heard any incriminating conversations, but petitioner contradicted this and sought to produce these witnesses without success.

In *Smith, supra, id.* at 131, the Court also noted:

> "The witnesses' [names] . . . address opened countless avenues of in-court and out-of-court investigation. To forbid this most rudimentary inquiry as a threshold is *effectively to emasculate the right of cross-examination itself."* (Emphasis ours.)

The Sixth Amendment guarantees not only a right to be "confronted with the witnesses against him", but also "to have compulsory process for obtaining witnesses in his favor". Both of these guarantees were denied when the name of these witnesses were withheld *(Brady v. Maryland,* 373 U.S. 83).

The trial court was obviously disturbed at what had transpired. We believe, however, that the trial court erred in failing to grant the motions of the defense to either dismiss the indictment, or to compel the revelation of both the witnesses' names. It will be recalled that secrecy was even extended to certain transactions involving Rodas' "brother".

Under the foregoing circumstances, we think it is significant to know that we are dealing with a defendant who has no prior criminal record and who took the stand in his own behalf, and categorically denied complicity in the crime. The tape recording of March 25th, was lost or destroyed, and the witnesses "Georgie" and "Toni", were not available, and we believe that the principles of the *Baum* case should be applied herein since this is an even stronger case than *Baum.*

III.

The trial court improperly permitted testimony beyond the period of the conspiracy as alleged in the indictment. The court erred in not ruling that the jury could infer that the testimony of "Georgie" and "Toni" would have been unfavorable to the Government since they were not called by the Government.

The foregoing points we submit warrant reversal. We wish it known, however, that we do not waive the error of the court below in permitting testimony beyond the period of the conspiracy (36-40). *Erber v. United States,* (C.C.A. 2) 234 Fed. 221; *Collenger v. United States,* (C.C.A. 7) 50 F.2d 345; *Oras v. United States,* (C.C.A. 9), 67 F.2d 463; and *Leady v. United States,* (C.C.A. 8), 280 Fed. 864.

In addition, since the Government's own informers ("Beba" and "Georgie") would not divulge "Toni's" name, the trial court should have granted the defense motion to charge her testimony would have been adverse to the prosecution. The same is true with respect to "Georgie", whose identity was withheld until very late in the trial for no cogent reasons.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

APPENDIX

ORDERS OF DENIAL OF PETITION FOR REHEARING AND RECONSIDERATION

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of April, one thousand nine hundred and seventy-six.

Present:

HON. J. JOSEPH SMITH,

HON. WILLIAM H. TIMBERS,
Circuit Judges

HON. FREDERICK vP. BRYAN,
District Judge

United States of America,

Plaintiff-Appellee,

v.

Orlando Miranda, a/k/a "Manolo",

Defendant-Appellant.

Orders of Denial of Petition for Rehearing and Reconsideration

74-2651

A petition for a rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of April, one thousand nine hundred and seventy-six.

United States of America,

Plaintiff-Appellee,

v.

Orlando Miranda, a/k/a "Manolo",

Defendant-Appellant.

74-2651

Orders of Denial of Petition for Rehearing and Reconsideration

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge

ORDER OF AFFIRMANCE DATED DECEMBER 3, 1975

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 3rd day of December, one thousand nine hundred and '75.

PRESENT:

HON. J. Joseph Smith,

HON. William H. Timbers, Circuit Judges.

Order of Affirmance Dated December 3, 1975

HON. Frederick vP. Bryan, District Judge.*

Docket No. 74-2651

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ORLANDO MIRANDA,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

* S.D.N.Y. sitting by designation.

OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 753—September Term, 1974.

(Argued March 17, 1975 Decided December 3, 1975.)

Docket No. 74-2651

UNITED STATES OF AMERICA,

Appellee,

—against—

ORLANDO MIRANDA,

Defendant-Appellant.

Before:

SMITH and TIMBERS, *Circuit Judges,*
and BRYAN, *District Judge.**

Appeal from a judgment of conviction on two counts of violating the narcotics laws, 21 U.S.C. §§ 841(a)(1), 841 (b)(1)(A), and 812, after a jury trial before Orrin G. Judd, *J.*, in the United States District Court for the Eastern District of New York.

Affirmed.

IRVING AXOLIK, New York, New York, *for Defendant-Appellant.*

ETHAN LEVIN-EPSTEIN, Assistant United States Attorney, Brooklyn, New York (David G.

* Frederick vP. Bryan, of the Southern District of New York, sitting by designation.

Trager, United States Attorney for the Eastern District of New York, Paul B. Bergman, Assistant United States Attorney, of counsel), *for Appellee.*

BRYAN, *District Judge:*

Orlando Miranda was convicted of (1) possessing with intent to distribute, and (2) distributing some 10 ounces of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 812 after a jury trial before Judge Orrin G. Judd in the United States District Court for the Eastern District of New York. He appeals from the judgment of conviction.[1]

Miranda does not contend that the evidence adduced at the trial was insufficient to sustain his conviction and, indeed, he could not well do so. He raises three issues which he contends require reversal. The first concerns the failure of the trial court to suppress testimony as to a conversation between Miranda and Gloria Rodas, an informant, on the ground that a tape recording of the conversation had been lost by the Drug Enforcement Administration and was not available at the trial. The second relates to the availability to the defense of two women who were not called as witnesses by the prosecution but who had been in the Jaguar Lounge bar on a number of occasions when Rodas and Miranda met. The third concerns the admission of evidence as to certain events which took place subsequent to the transaction alleged in the indictment.

Gloria Rodas was a major witness for the prosecution, who testified that she negotiated and carried out the pur-

1 Miranda was sentenced to six years' imprisonment on each of the two counts, to run concurrently, with a special parole term of four years to follow, and fined $2,500 on Count 1. He is on bail pending appeal.

chase of 10 ounces of cocaine from Miranda for $10,000. Rodas had been cooperating with the Government following her arrest and plea of guilty to a narcotics conspiracy charge in an unrelated case.[2]

Rodas testified to the following effect:

On March 1, 1974, at the request of special agents of the Drug Enforcement Administration (DEA), she went to the Jaguar Lounge, a bar in Queens operated and partially owned by Miranda, and struck up an acquaintance with him there. During other visits to the Jaguar in March, she talked with him further. On March 15, 1974 Rodas brought up the subject of drugs with Miranda. Miranda told her that people he knew were in jail but that they were expected to be released shortly and he would have more to tell her then. She told Miranda that she was interested in buying a kilogram of cocaine and Miranda said they would talk more about it later.

On March 21, 1974, Rodas again went to the Jaguar and talked with Miranda about the proposed purchase of cocaine. Miranda told her the purchase could be arranged and they agreed to meet the following night to discuss the matter further. On March 22, 1974 they met at the Jaguar, as arranged. Miranda told Rodas he could let her have 10½ ounces, which was all he could get his hands on, for $10,000 ($1,000 an ounce) with the extra half ounce thrown in as a token of friendship. They agreed to consummate the transaction on March 25, 1974.

Rodas had kept the special agents informed of her negotiations with Miranda. On the afternoon of March 25 she met with agents McMullan and Schnackenberg. She was searched, supplied with a Kel transmitter, and given $6,000 in cash. The agents searched her car. She then

2 Prior to her testimony in the case at bar, Rodas had been sentenced to five years' probation on this conviction.

drove to the Jaguar Lounge in her car with the agents' car following her. She met Miranda in the Jaguar as arranged. Miranda asked her to drive him a short distance to an auto body shop where his car was being repaired. During the drive Miranda told her in Spanish that he had the merchandise with him. She said she could not take it all since she only had $6,000 of the $10,000 purchase money with her. Miranda said he would let her have the full amount of the purchase and would trust her for the balance of $4,000. He offered to let her taste a sample of the cocaine to test its purity. She replied that if he trusted her, she would trust him. Miranda produced a packet of cocaine, placed it in an attache case on the back seat of the car, and took the $6,000. Rodas dropped him at the auto body shop.

Rodas drove to a rendezvous with the agents who removed the packet of cocaine from the attache case and field-tested it. The package contained some 10 ounces of cocaine.

On April 2, 1974, Rodas met with the agents. She was searched, again wired with a transmitter, and given the balance of $4,000 to pay off Miranda. She talked with Miranda in the kitchen of the Jaguar Lounge and gave him the money. They then discussed the possibility of future narcotics purchases and Miranda told her they would have to be discreet since many policemen would be coming to his bar during the forthcoming baseball season.

Rodas returned to the Jaguar on April 19, 1974 and asked Miranda to meet with her "brother" who, she said, was also in the narcotics business. On May 8, 1974 Rodas and an undercover agent, Pincol, posing as her brother, met Miranda in the Jaguar. Pinol thanked Miranda for the favor he had done his "sister" and suggested that Miranda supply him with a kilo of cocaine. Miranda replied that he was getting out of the business.

Group Supervisor McMullan and Special Agents Schnackenberg, Castillo and Pinol also testified for the prosecution. In substance, the testimony of McMullan and Schnackenberg corroborated the testimony of Rodas with respect to the arrangements for her to cooperate with the Government in this case, her meetings with the agents during the course of her negotiations with Miranda, and her visits to the Jaguar Lounge, a number of which were covered by surveillance. McMullan and Schnackenberg also testified that Rodas had been equipped with a radio transmitter before her visits to the Jaguar on March 25 and April 2, 1974; that she had been given $6,000 in government funds on March 25 and $4,000 on April 2; that on March 25 both her person and her car, including the attache case on the back seat, had been searched before she left for the Jaguar; and that a similar search had been made on April 2.

On March 25, McMullan, Schnackenberg and Castillo followed Rodas in their car and kept her under surveillance. They saw her enter the Jaguar, emerge with Miranda and drive to the auto body shop with him. During the drive the Kel radio transmitter which Rodas had with her was turned on and the conversation in Spanish between Rodas and Miranda was heard clearly by the agents in the surveilling car and recorded on tape. Castillo was the only agent in the car who understood Spanish and he gave a running account of the conversation to the other agents in English as it came over the transmitter. Agent Castillo's testimony as to the transmitted conversation of March 25 corroborated Rodas' version of it.

After Miranda left Rodas' car at the body shop, the agents met Rodas and took the packet of cocaine from the attache case where Rodas said Miranda had placed it. They proceeded to the office of the DEA with the cocaine and the tape of the Rodas-Miranda conversation,

where Agent Castillo listened to a portion of the tape. Shortly after that, however, the agents were unable to find the tape, which had inexplicably disappeared from the DEA office. It was never found again, though the agents made an exhaustive search for it. Thus, the tape was unavailable at the trial, both to the prosecution and the defense.

On April 2, 1974, when Rodas went to the Jaguar to deliver the $4,000 final payment to Miranda, the radio transmitter on her person was again turned on. The tape of her conversation with Miranda at the Jaguar turned out to be inaudible and thus there was no recording of what was said in that conversation either.

Agent Pinol's testimony in substance corroborated Rodas' account of her final conversation with Miranda at the Jaguar on May 8, 1974.

Miranda took the stand and was the only witness for the defense. He strenuously denied selling cocaine to Rodas, receiving any money from her, or having anything to do with narcotics. He stated that he had talked with Rodas from time to time at the Jaguar and that she had driven him from the Jaguar to the auto body shop on March 25. On one occasion, when Rodas told him her brother had a lot of money to buy cocaine, he refused to discuss the subject and walked away from her. His version of the conversation with Rodas during the March 25 drive to the auto body shop was that, at Rodas' request, he had picked up and opened a valise in the back of the car and looked into it. He saw some white powder enclosed in plastic. Rodas said it was cocaine and that she was showing it to him to make him nervous or afraid. He got out of the car and told her he would not drive in her car again. Nevertheless, he admitted talking with Rodas several times thereafter and meeting her supposed "brother", agent Pinol.

I.

The testimony of Rodas and Agent Castillo as to the conversation of March 25, 1974 between Rodas and Miranda, concerning delivery of cocaine by Miranda and payment of $6,000 to him, was a crucial part of the prosecution's case. During the trial the defense moved to suppress testimony of Rodas and Castillo concerning the March 25 conversation on the grounds that the tape recording which had been made of the conversation had been lost by the Government and unavailable, and that the Government had failed to disclose prior to the second day of the trial that there was such a recording which had been lost. The motion to suppress was denied by the trial court, as was a defense motion for a judgment of acquittal on similar grounds at the conclusion of the case. Thereafter, a motion to set aside the verdict and for a judgment of acquittal on these grounds was also denied.

Miranda's first contention is that the unavailability of the tape and the trial court's failure to suppress the Rodas-Castillo testimony as to the March 25 conversation requires reversal of the conviction and the entry of a judgment of acquittal.

During the pre-trial proceedings, the prosecution furnished defense counsel with tapes and transcripts of several conversations pursuant to Fed. R. Crim. P. 16. The Assistant United States Attorney informed the court and defense counsel that he had turned over all the tape recordings in the Government's possession. At the time he made that statement, the Assistant was well aware that a tape recording had been made of the March 25 Rodas-Miranda conversation and that it had been lost.[3]

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3 The Assistant's representation to the court and defense counsel that all the tapes and recordings in the Government's possession had been turned over, while it was literally true, can scarcely be considered other

In the material furnished to the defense under the Jencks Act, 18 U.S.C. §3500, there was no mention in any of the agents' reports or in any of the other material of the March 25 tape recording or its loss. Defense counsel did not learn that a tape recording had been made of the conversation and had been lost until the morning of the second day of the three-day trial, Wednesday, September 25, 1974. Due to Judge Judd's Friday motion calendar and the ensuing weekend, the trial was adjourned until Monday, September 30.

On Monday, September 30, at the request of the defense, the court permitted the defense to recall agent Schnackenberg to the stand before the jury and cross-examine him at length as to the tape and its loss. The defense also cross-examined Supervisor McMullan and agent Castillo extensively on these matters. In addition, there was redirect on the subject.

The substance of the testimony of the agents was as follows: The transmission of the March 25 conversation to the surveilling agents in their car was quite clear. The cassette on which the transmitted conversation was recorded was removed from the recording device and taken to the DEA office on the evening of March 25 by the agents who had listened to the transmission. Agent Castillo listened to some three minutes of the recording; apparently no one listened to the full recording. A day or two later, when Schnackenberg looked for the cassette recording in order to have it transcribed, in accordance with the usual practice, it had inexplicably disappeared. Schnackenberg reported the loss to McMullan, his Group Supervisor.

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than misleading. It left the impression that there had been no tape recording of the March 25 conversation. We strongly disapprove of such conduct, which is painfully close to sharp practice and unbecoming for a prosecutor representing the Government of the United States.

Despite repeated and diligent attempts to locate the cassette by the agents concerned, it could not be found. These efforts were renewed shortly before the trial at the request of the prosecutor, with the same negative result. No notes or other records concerning the cassette recording or its disappearance had been made.

The defense did not request that any further inquiry be conducted concerning the tape and the circumstances of its loss. Nor did it seek to examine agents McMullan and Schnackenberg, either before the jury or in camera, with respect to Castillo's translation to them of the Miranda-Rodas conversation in Spanish as it was being transmitted to the agents' car on March 25. The defense moved for suppression of the Castillo-Rodas testimony solely on the basis of the evidence in the record. At the conclusion of the case it moved for a judgment of acquittal on the same record.

The evidence concerning the tape and its loss was before the jury. Defense counsel was in a position to make the most of that evidence in summation, and did so. The jury was entitled to consider such evidence in reaching its verdict. It found the defendant guilty on both counts.

On its motion to set aside the verdict, the defense did not seek a further hearing but again relied solely on the record. Judge Judd denied the motion on the basis of the record.

In a criminal case, the Government plainly has the obligation to make available to the defense evidentiary material in its possession which is disclosable under the due process safeguards of *Brady* v. *Maryland*, 373 U.S. 83 (1963), or the requirements of Fed. R. Crim. P. 16 or the Jencks Act, 18 U.S.C. §3500.

If the Government fails to carry out that obligation, a serious question arises as to whether such failure calls

for the imposition of sanctions against the Government.[4] Whether or not sanctions for nondisclosure should be imposed depends in large measure upon the extent of the Government's culpability for failure to make disclosable material available to the defense, on the one hand, weighed against the amount of prejudice to the defense which resulted, on the other. *United States* v. *Pfingst*, 490 F.2d 262, 277 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974); *United States* v. *Mayersohn*, 452 F.2d 521, 526 (2d Cir. 1971); *United States* v. *Rosner*, 516 F.2d 269, 272 (2d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3207 (U.S. Oct. 7, 1975); *United States* v. *Hilton*, 521 F.2d 164, 166 (2d Cir. 1975); *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

In the recent case of *United States* v. *Morell*, slip op. 5873 (2d Cir. August 29, 1975), the issue was whether defendants convicted of serious narcotics offenses were entitled to a new trial because the Government had failed to make disclosable evidentiary material in its possession available to the defense. While an appeal from the judgment of conviction was pending, the prosecution advised this court and the defense that it had for the first time discovered the existence of a confidential file in the possession of the Drug Enforcement Administration relating to dealings and arrangements between narcotics agents and the prosecution's principal witness, the informant Valdez. The documentary material in the file bore directly

4 Such sanctions include the exclusion or suppression of other evidence concerning the subject matter of the undisclosed material, *see* Fed. R. Crim P. 16(d)(2); 18 U.S.C. §3500(d); the grant of a new trial, *see* Fed. R. Crim. P. 33; 18 U.S.C. §3500(d); *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 570-71 (2d Cir. 1961); or, in exceptional circumstances, dismissal of the indictment or the direction of a judgment of acquittal, *see United States* v. *Heath*, 147 F. Supp. 877 (D. Hawaii 1957); *United States* v. *Jackson*, 508 F.2d 1001, 1005-08 (7th Cir. 1975); *United States* v. *Banks*, 374 F. Supp. 321, 328 n.2 (D. S.D. 1974).

on Valdez' credibility and was likely to have bolstered the theory of the defense. The court of appeals then remanded the case to the district court to make appropriate findings with respect to the new material which had come to light. The district court, without holding an evidentiary hearing as to the Government's culpability for its failure to disclose the material earlier or making any determination with respect thereto, denied defendant a new trial.

When the appeal again came before this court, Judge Moore stated:

> The standards governing the grant of a new trial [for failure to disclose evidence in the Government's possession favorable to defendant] vary according to the extent of the government's culpability. If the prosecutor has intentionally suppressed evidence or ignored evidence whose high value to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely material or favorable to the defense. *E.g.*, *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1972); *United States* v. *Keogh*, 391 F.2d 138, 146-47 (2d Cir. 1968). If, on the other hand, the government's failure to disclose is merely inadvertent or negligent, a new trial is required only if there is a "significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Rosner*, 516 F.2d 269, 273 (2d Cir. 1975); *United States* v. *Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975); *Grant* v. *Alldredge*, 498 F.2d 376, 380 (2d Cir. 1974); *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969).

Slip op. at 5878-79.

After reviewing the material which the Government had failed to disclose, Judge Moore found there was not "a significant chance" that the undisclosed information would have affected the jury's verdict and therefore concluded that

> [i]f the district court finds that the failure to disclose this material was deliberate or the result of gross negligence on the part of the government, it should order a new trial. If, however, the failure was simply inadvertent or negligent, a new trial would not be required.

Slip op. at 5882. The case was again remanded to the district court with directions to hold an evidentiary hearing and make appropriate findings as to the extent of the Government's culpability for its failure to disclose. *See also United States* v. *Hilton, supra,* at 166.

Where disclosable evidentiary material which came into the possession of the Government has been lost or destroyed, and is unavailable to the defense for that reason, the standards for determining whether sanctions should be imposed on the Government, like those applied in *Morell, supra,* and the cases there cited, depend on the extent of the Government's culpability for the loss or destruction and the amount of the prejudice to the defense which resulted. However, in such a case, unlike *Morell,* since the material cannot be produced for inspection, it may be difficult to ascertain what its value to the defense would have been.

In *United States* v. *Augello,* 451 F.2d 1167 (2d Cir. 1971), *cert. denied,* 405 U.S. 1070 (1972), part of an allegedly incriminating conversation between the defendant and the principal witness for the prosecution had been recorded on tape. The tapes of the conversation had been destroyed by police agents because they were said to be

unintelligible. On appeal from the judgment of conviction, one of defendant's contentions was based on the failure to suppress the testimony of the police agents about the taped conversation, because the tape had been destroyed and was unavailable at the trial. This court rejected that contention, stating:

> While the degree of compliance by the police agents with existing departmental regulations is not crystal clear, the record taken as a whole gives no indication of such bad faith or negligence in the destruction of the allegedly unintelligible tapes as would call for the suppression of the testimony of the police agents.

451 F.2d at 1170.

In so holding, this court relied on *United States* v. *Bryant,* 439 F.2d 642 (D.C. Cir. 1971) (*Bryant I*). *Bryant I* was an appeal from narcotics convictions. A tape recording of a crucial conversation between the defendants and an undercover narcotics agent regarding the transaction at issue was unaccountably lost and thus was unavailable at the trial. The appellants contended that the testimony of the narcotics agent with respect to the recorded conversation should have been suppressed because the Government had failed to produce the tape, and that they therefore were entitled to a new trial or dismissal of the indictment.

The narcotics agent who had custody of the tape testified in substance that since he had never intended the tape to be used in the trial, he had made no effort to preserve it. The court characterized the case as one of "intentional non-preservation by an investigative official," and went on to say that the agent's conduct lay somewhere in the middle "between good faith but inadvertent loss and bad faith destruction," 439 F.2d at 647. It held that the tape was evidence which the Government was obligated to pre-

serve and disclose to the defense, either under *Brady*, Rule 16, or the Jencks Act, and that whether or not the sanction of suppression of the narcotics agent's testimony should be imposed depended on the circumstances of the loss. It found the record was inadequate for a determination of that question and therefore remanded the case to the district court with directions to

> weigh the degree of negligence or bad faith involved, the importance of the evidence lost and the evidence of guilt adduced at the trial in order to come to a determination that will serve the ends of justice.

439 F.2d at 653.

The court pointed out, 439 F.2d at 651, that the Government had the burden of explaining the loss of evidence which came into its possession and of showing that the loss was not intentional, deliberate, or in bad faith, and that earnest efforts had been made to find the evidence, once its loss was discovered.

On remand, the district judge, after an evidentiary hearing, held that the convictions should stand. 331 F.Supp. 927 (D. D.C. 1971). The case then again came before the court of appeals in *United States* v. *Bryant*, 448 F.2d 1182 (D.C. Cir. 1971) (*Bryant II*). The court found that although the negligence of the agent was "regrettably great"; it was outweighed by other factors. It held that

> under the more pragmatic balancing approach which we have adopted for these cases, the unintelligibility of the tapes—when combined with the very strong evidence of guilt adduced at trial—outweighs the negligence involved in the loss of the tape.

448 F.2d at 1184. The court affirmed the convictions.[5]

5 The statements in *Bryant I* and *II* indicating that, in the future, the District of Columbia Circuit would place a much heavier burden on the Government to avoid the imposition of sanctions for nondisclosure due to loss of evidence is plainly *dictum*. These standards for the future were not applied in the actual case before the District of Columbia Circuit in *Bryant* and we do not apply them in the case at bar. It was the "pragmatic balancing approach" which was the basis of the *Bryant* decisions.

Moreover, it is at least doubtful whether the District of Columbia Circuit has materially altered that approach in cases subsequent to *Bryant*. *See United States* v. *Patterson*, 495 F.2d 107, 112 n.7 (D.C. Cir. 1974); *United States* v. *Carpenter*, 510 F.2d 738, 740 (D.C. Cir. 1975); *United States* v. *Person*, 478 F.2d 659, 660 (D.C. Cir. 1973); *United States* v. *Ferguson*, 498 F.2d 1001, 1005-06 (D.C. Cir.), *cert. denied*, 419 U.S. 900 (1974).

Other circuits have dealt with the loss of disclosable evidence by the Government on a case-by-case basis, and have refused to impose sanctions where the loss was inadvertent and not deliberate or in bad faith, and there was not such prejudice to the defendant as to deny him a fair trial. *See United States* v. *Love*, 482 F.2d 213 (5th Cir. 1973); *United States* v. *Sewar*, 468 F.2d 236 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *United States* v. *Shafer*, 445 F.2d 579, 581-82 (7th Cir.), *cert. denied*, 404 U.S. 986 (1971); *United States* v. *Rojas*, 502 F.2d 1042, 1044-45 (5th Cir. 1974). *See also United States* v. *Augenblick*, 393 U.S. 348 (1969), cited in *United States* v. *Augello*, *supra*, where the Supreme Court indicated that while sanctions should be imposed on the Government for bad faith suppression of evidence, they are not appropriate where the loss was in good faith and earnest efforts had been made to find the evidence, once its loss was discovered.

In the case at bar there is no question that the defense would have been entitled to have the March 25 tape recording made available either under *Brady*, Rule 16, or the Jencks Act had it not been lost. Thus, the first question presented is the extent of the Government's culpability for the loss of the tape.

Here, unlike *Morell, Bryant I,* and other cases cited, an additional hearing before the trial judge on the culpability question is unnecessary. The circumstances of the loss of the tape and the efforts made to find it, once the loss was discovered, were thoroughly covered by the testimony in the record. Most of that testimony was adduced by the defense in its cross-examination of the narcotics agents. The defense was content to rest on that testimony in its various suppression motions.

On the basis of that evidence, Judge Judd, who as the judge presiding at the trial was in a position to assess the credibility of the witnesses, found that while the loss of the tape "indicates negligence on the part of the government agents, the Court cannot find that the loss was intentional or in bad faith • • •."

The evidence before Judge Judd was quite sufficient to satisfy the Government's burden on the issue of culpability. Judge Judd's finding on that issue is supported by the evidence in the record and cannot be said to be clearly erroneous. It is dispositive of that issue. *See United States* v. *Rosner, supra,* at 272-73, citing *United States* v. *Johnson,* 327 U.S. 106, 111 (1946); *United States* v. *Pfingst, supra,* at 273, n.11.

Judge Judd further found that the defendant had not been prejudiced by the failure of the prosecution to disclose the loss of the tape earlier since the "defense counsel have not indicated any major differences in procedure which would have been followed at the trial had the loss of the tapes [sic] been known from the beginning," and "[t]here is no indication • • • that the defendant would have been materially better off had he known of the lost tape earlier than he did." As the judge who presided at the trial, Judge Judd was in the best position to assess the defendant's contention that he had been prejudiced by

failure to disclose earlier. We accept his findings that no such prejudice occurred.

Thus, this is not a case of intentional, deliberate, or bad-faith loss or suppression of evidence by government agents in which prophylactic sanctions against the Government would be appropriate. The loss of the tape recording by the agents was merely inadvertent or negligent. The question, then, is whether the defense was so greatly prejudiced by the unavailability of the recording at the trial as to require the imposition of sanctions against the Government.

In considering this question, several distinctive features of this case must be borne in mind. In cases such as *Morell, supra,* and *Rosner, supra,* where the Government had failed in its obligation to disclose evidence, the undisclosed evidence was before the court for evaluation. Assessment of the effect of such evidence, had it been produced at the trial, was relatively easy.

In the case at bar, however, since the recording was irretrievably lost, there is no way in which it can be determined with certainty what it contained. Indeed, since there is no evidence that anyone heard the entire recording played back, it is not even certain that the key portions of the recording were intelligible.

The Government strenuously urges that if the recording had not been lost it would have fully confirmed the testimony of Castillo and Rodas concerning the March 25 Rodas-Miranda conversation. It contends that if any prejudice arose because of the loss of the tape, it was the Government which was prejudiced and not the defense.

The defense, on the other hand, goes on the theory that the recording would have confirmed Miranda's version of the conversation and thus would have exculpated him.

While it cannot be determined with certainty which of these contentions is correct, in the light of the record

concerning the transmission of the March 25 conversation to the surveilling car and the circumstances of the loss of the tape, it is more likely that the recording would have supported the version of the conversation testified to by the government witnesses rather than the somewhat incredible version testified to by Miranda.

Moreover, here, unlike most cases involving government failure to produce disclosable evidence, the fact that there was a tape recording of the March 25 conversation and the circumstances of its loss were fully brought out by the defense before the jury in its extensive cross-examination of the government agents. In its summation to the jury, the defense made the most of the loss of the tape as casting doubt on the Government's case and tending to support Miranda's version of the March 25 conversation. The jury evidently rejected this contention in reaching its verdict of guilty.

It may be noted that, quite understandably, the defense elected not to elicit from McMullan and Schnackenberg, the non-Spanish speaking agents in the surveilling car on March 25, testimony as to the simultaneous running account in English which agent Castillo gave them of the transmission of the Rodas-Miranda conversation. Their testimony on this subject might well have tended to confirm the Government's version of that conversation.

The case against Miranda was a strong one. It by no means rested on the testimony of the informant Rodas alone. Much of her testimony was corroborated by the testimony of the government agents who followed the progress of the meetings between Rodas and Miranda and the results of those meetings closely. For example, the Rodas version of her conversation of March 25 with Miranda was corroborated by agent Castillo's testimony as to the transmission of the conversation to the surveilling car, and supported by the testimony as to the search

of Rodas and her car before she picked up Miranda and the packet of cocaine which the agents found in the attache case in her car after she had left Miranda at the body shop. Her testimony as to the May 8 conversation with Miranda concerning narcotics was corroborated by agent Pinol and, to a large extent, by Miranda himself.

Judge Judd concluded that under all the circumstances here the absence of the tape did not deprive Miranda of a fair trial. We cannot disagree with that conclusion.

As Judge Judd further pointed out, there is no indication that any additional evidence could be produced on a new trial. Thus, nothing would be gained if a new trial were granted. The alternatives here are between affirmance of the conviction, on one hand, and, on the other, the setting aside of the conviction and the entry of a judgment of acquittal on the ground that the Castillo-Rodas testimony as to the crucial March 25 conversation must be suppressed and stricken from the record. The latter alternative would be an unduly heavy sanction to impose upon the Government for the loss of a piece of evidence concerning a subject on which there was other primary evidence available and adduced. *Cf. United States* v. *Fishel*, 324 F. Supp. 429, 430-32 (S.D.N.Y. 1971).

Whether we apply the pragmatic balancing test of *Bryant* or the significant chance test of *Morell* and *Rosner* to the case at bar, the result is the same. Under the pragmatic balancing test, the strength of the case against the defendant, coupled with the evidence placed before the jury as to the circumstances of the loss, outweighs the relatively slight degree of negligence involved in the loss of the tape.[6] Viewing the record as a whole, we also find that there is not a significant chance that the lost record-

6 In *Bryant II* the court refused to apply the sanction of suppression, even though it found that "the degree of negligence shown is regrettably great," 448 F.2d at 1184.

ing, had it been available to the defense at the trial, would have avoided a verdict of guilty. Thus, there is no ground on either theory for the imposition of the sanction of suppression.

We hold that the denials by Judge Judd (1) of the motion during the trial to suppress the testimony of the government witnesses as to the March 25 conversation, (2) of the motion for judgment of acquittal at the close of the trial on the ground of failure to suppress such testimony, and (3) of the motion to set aside the verdict and for a judgment of acquittal on the same ground, did not constitute reversible error.

II.

Miranda's next contention relates to the availability to the defense of two women, "Georgie" and "Toni," who were not called as witnesses by the prosecution but who had been at the Jaguar Lounge on several occasions when Rodas met Miranda.

Appellant's argument that he was prejudiced by what occurred at the trial with respect to "Georgie" and "Toni" is based in substantial measure on a misapprehension of the evidence in the record. The appellant is quite wrong in stating that "both of these women were admittedly present at virtually all of the conversations with the appellant concerning drug transactions." The record is to the contrary. Rodas testified that while from time to time "Georgie" and "Toni" were at the Jaguar Lounge when she met Miranda, neither was present at any of the conversations she had with Miranda concerning narcotics.[7]

7 Rodas testified that all her conversations with Miranda concerning drugs were "in private" and that "no one ever heard any part of our conversation." This assertion was not contradicted by Miranda when he took the stand and admitted talking with Rodas on occasion about narcotics.

Nor was either of them in Rodas' car on March 25 when the narcotics transaction was consummated.

The fact that Rodas had met Miranda at the Jaguar was not in issue. There was no reason for the prosecution to call either "Georgie" or "Toni" as witnesses, as the appellant implies, or to inform the defense about them prior to trial.

After Rodas referred to "Georgie" in her testimony, "Georgie" was produced by the prosecution at the request of the defense. As the defense was made aware, "Georgie" had pled guilty to the same narcotics conspiracy charge as Rodas and was cooperating with the Government. After interviewing "Georgie," the defense declined to call her as a witness.

Both Rodas and "Georgie" refused to disclose "Toni's" identity or where she could be found on the ground that such disclosure might place her in danger. There was nothing to indicate that "Toni" had any relationship with the Government and the prosecution represented to the court that it had no control over her or any knowledge of her whereabouts. There is no reason to question that representation and the defense apparently accepted it.

In support of his contention that what occurred with respect to "Georgie" and "Toni" requires reversal, appellant relies on *Roviaro* v. *United States*, 353 U.S. 53 (1957). and *United States* v. *Baum*, 482 F.2d 1325 (2nd Cir. 1973). Such reliance is misplaced.

In *Roviaro*, the Supreme Court reversed a narcotics conviction because the Government had refused

> to disclose the identity of an undercover employee who had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime,

> and might be a material witness as to whether the accused knowingly transported the drugs as charged.

353 U.S. at 55.

In *Baum*, the prosecution had refused to reveal the identity of a government witness whose testimony was crucial both to the prosecution and to the defense until the witness took the stand. At the completion of the direct examination of the witness, the defense requested a continuance in order to prepare adequately for a cross-examination. The continuance was denied. This court concluded that there were no valid considerations to justify concealment of the identity of the prosecution witness until he took the stand, and that the defendant had not been afforded "a fair opportunity to meet the critical and damaging proof on an offense not presented against him in the indictment," 482 F.2d at 1332. It therefore reversed the conviction and granted a new trial.

It requires no extended discussion to demonstrate that neither *Roviaro* nor *Baum* are apposite here. There was no showing that either "Georgie" or "Toni" were material witnesses for either the prosecution or the defense. "Georgie" was produced by the Government and interviewed by the defense. As far as appears, "Toni" had no relationship with the Government. There was no need for the Government to go further than it did. *Cf., e.g., United States* v. *D'Amato*, 493 F.2d 359, 366 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *Ortega*, 471 F.2d 1350, 1359 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973); *United States* v. *Johnson*, 467 F.2d 630, 640 n.9 (2d Cir. 1972), *cert. denied*, 410 U.S. 932 (1973).

Appellant also suggests that it was error not to charge that the jury could infer from the Government's failure to

call "Georgie" and "Toni" as witnesses that their testimony would have been adverse to the prosecution.

Whether or not such a "missing witness" charge should be given lies in the sound discretion of the trial court. *United States* v. *Llamas*, 280 F.2d 392, 393 (2d Cir. 1960); *United States* v. *Cotter*, 60 F.2d 689, 691-92 (2d Cir.), *cert. denied*, 287 U.S. 666 (1932); *United States* v. *Ferguson*, 498 F.2d 1001, 1008 (D.C. Cir.), *cert. denied*, 419 U.S. 900 (1974). Cf. C. McCormick, Handbook of the Law of Evidence §272, at 659 (2d ed. 1972).

Here the court correctly charged the "general rule" that

> if it is specially within the power of the prosecution or defense to produce a witness who could give material testimony on an issue or to produce other evidence, the failure to call the witness may give rise to an inference that the evidence would be unfavorable.

It then added that

> You cannot draw any such inference with regard to a witness or exhibit that is equally available to both parties or where the witness testimony would be merely cumulative.

No exception was taken to the charge on this subject. The charge as given was entirely proper in the circumstances of this case. *See United States* v. *D'Angiolillo*, 340 F.2d 453, 457, 457 n. 5 (2d. Cir.), *cert. denied*, 380 U.S. 955 (1965); *United States* v. *Super*, 492 F.2d 319, 323 (2d Cir.), *cert. denied*, 419 U.S. 876 (1974); *United States* v. *Bergman*, 354 F.2d 931, 935 (2d Cir. 1966). *Cf. United States* v. *Brown*, 511 F.2d 920, 925 (2d Cir. 1975).

III.

Appellant's final contention is that it was error to admit testimony as to conversations between Miranda, Rodas,

and agent Pinol relating to narcotics subsequent to March 25, when the transaction charged in the indictment was consummated. This contention is also without merit.

It is settled law in this circuit that "evidence of similar acts, including other crimes, is admissible when it is substantially relevant for a purpose other than merely to show defendant's criminal character or disposition." *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967); *United States* v. *Brettholz*, 485 F.2d 483, 487 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974); *United States* v. *Warren*, 453 F.2d 738, 745 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966); *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975). The conversations subsequent to March 25 were plainly relevant to the question of Miranda's intent to possess and distribute cocaine, and were properly admitted under limiting instructions to the jury that they could only "be considered as bearing on his [Miranda's] intention in connection with the March 25th charge."

The judgment of conviction is affirmed.

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No. 75-1590

In the Supreme Court of the United States

OCTOBER TERM, 1976

ORLANDO MIRANDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 5a-28a) is reported at 526 F. 2d 1319.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a-4a) was entered on December 3, 1975, and a petition for rehearing with suggestion for rehearing en banc (Pet. App. 1a-3a) was denied on April 8, 1976. The petition for a writ of certiorari was filed on April 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner's motion to strike two witnesses' testimony because of the government's inadvertent loss of disclosable evidence.

2. Whether the district court erred in not requiring disclosure of the identity of an acquaintance of a government informant and in refusing to give a "missing witness" instruction.

3. Whether the district court erred in admitting evidence of similar acts petitioner committed.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possession of cocaine with intent to distribute and of distributing cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) and 812. He was sentenced to concurrent terms of six years' imprisonment, to be followed by four years' special parole. The court of appeals affirmed in a comprehensive opinion (Pet. App. 5a-28a).

As summarized by the court of appeals (Pet. App. 6a-10a), the evidence showed that on March 22, 1974, petitioner told government informant Gloria Rodas that he would sell her 10 1/2 ounces of cocaine for $10,000. On March 25, 1974, agents of the Drug Enforcement Administration (D.E.A.) searched Rodas and her car, equipped her with an electronic radio transmitter, and furnished her with $6,000 in bills whose serial numbers had been pre-recorded. The agents followed Rodas to her meeting with petitioner at the latter's cocktail lounge. Upon her arrival, petitioner asked her to drive him to a nearby auto body shop.

During the trip, petitioner told her in Spanish that he had the cocaine with him. When Rodas explained that she had only $6,000 in her possession, petitioner agreed to give her the entire quantity of cocaine and extend her credit for the balance. Petitioner then placed a packet of cocaine in an attache case on the back

seat of the car and withdrew the money. Their conversation was transmitted to the D.E.A. agents, who recorded it on a tape cassette. After Rodas left petitioner at the auto shop, she drove to an appointed rendezvous with the surveillance agents, who removed the cocaine from the attache case.

On April 2, 1974, D.E.A. agents again searched Rodas, furnished her with a transmitter, and gave her $4,000 in pre-recorded bills to pay petitioner for the cocaine. The payoff was duly recorded by the surveillance agents.

On May 8, 1974, Rodas introduced undercover narcotics agent Pinol to petitioner as her brother. Pinol thanked petitioner for the favor he had done his sister and requested that petitioner supply him with a kilogram of cocaine. Petitioner refused to do so, claiming that he was getting out of the business.

At trial, D.E.A. agents McMullan and Schnackenberg corroborated Rodas' testimony concerning the March 25, 1974, purchase, which they had kept under continuous surveillance from their car. They also testified that they had heard the conversation in Spanish between Rodas and petitioner clearly as it was being recorded and that D.E.A. agent Castillo had provided them with a running translation of it. Castillo's testimony supported Rodas' version of the March 25 transaction.

Castillo also testified that when the agents returned to the D.E.A. office after the March 25 meeting, he had listened to approximately three minutes of the recording (Pet. App. 12a). But when Schnackenberg looked for the cassette a day or two later to have it transcribed in accordance with the usual practice, the recording had disappeared. Despite the agents' repeated and conscientious attempts to locate the cassette, both at the time of its loss and shortly before trial, the recording was never found (Pet. App. 13a).

The defense moved to suppress Rodas' and Castillo's testimony concerning the March 25 conversation on the grounds that the recording had been lost by the government and that the prosecution had failed to reveal that such a recording had been made until the second day of trial. The court permitted petitioner to recall agent Schnackenberg and to cross-examine Castillo and McMullan at length before the jury concerning the missing tape (Pet. App. 12a). The circumstances of the loss of the tape and the efforts made to find it were thoroughly presented to the jury. The defense did not request that any further inquiry be conducted concerning the contents of the tape or the circumstances of its loss (Pet. App. 13a).

The district court found that while the loss of the tape "indicates negligence on the part of the government agents, the Court cannot find that the loss was intentional or in bad faith * * * " (Pet. App. 20a). It held that the absence of the tape did not deprive petitioner of a fair trial and refused to suppress the witnesses' testimony (Pet. App. 23a). Defense counsel fully utilized the testimony concerning the nature of the tape and its loss in cross-examining the government agents and in his closing argument (Tr. 137, 355, 361, 367), and the jury was instructed that it could consider all such evidence (Tr. 403-404).

The court of appeals upheld the district court's finding that the loss of this evidence was "merely inadvertent or negligent" and affirmed (Pet. App. 21a).

ARGUMENT

1. Petitioner contends (Pet. 20) that his conviction should be reversed and the indictment dismissed because of the loss of the recording and the government's failure to disclose its making and loss until the second day

of trial. However, as the court of appeals correctly noted (Pet. App. 19a), the courts "have refused to impose sanctions where the loss [of disclosable evidence] was inadvertent and not deliberate or in bad faith, and there was not such prejudice to the defendant as to deny him a fair trial." See *United States* v. *Augenblick*, 393 U.S. 348; *United States* v. *Rojas*, 502 F. 2d 1042, 1044-1045 (C.A. 5); *United States* v. *Sewar*, 468 F. 2d 236 (C.A. 9), certiorari denied, 410 U.S. 916; *United States* v. *Shafer*, 445 F. 2d 579, 581-582 (C.A. 7), certiorari denied, 404 U.S. 986. Here, as shown above, that evidence demonstrated that the loss of the tape was inadvertent—the result of negligence and not of deliberate wrongdoing—and that strenuous efforts were made to locate it.

The unavailability of the tape did not so prejudice the defense as to require either suppression of the evidence or dismissal of the indictment. The government's case against petitioner was strong (Pet. App. 22a). In addition to Rodas' testimony, it included the visual observations of the surveillance agents, the discovery of cocaine in Rodas' car after her meeting with petitioner, the agents' careful pre-encounter searches to eliminate the possibility that Rodas might have obtained the cocaine from another source, and Pinol's corroborative testimony. Moreover, unlike most cases involving governmental failure to produce disclosable evidence, the significance of the loss of the tape and the inferences to be drawn from its unavailability were fully argued before the jury.

Under these circumstances, the district court correctly concluded that the absence of the tape did not affect petitioner's substantial rights, and the court of appeals affirmed that finding (Pet. App. 23a). That decision is correct and does not warrant further review. See *United*

States v. *Johnson*, 327 U.S. 106, 112; *Mesarosh* v. *United States*, 352 U.S. 1, 9; cf. *United States* v. *Agurs*, No. 75-491, decided June 24, 1976.

2. Petitioner contends (Pet. 28-31) that the district court erred in not requiring the government to disclose the identity of two women, "Georgie" and "Toni"; in denying a continuance once the identity of one of the women became know during trial; and in not giving a "missing witness instruction" concerning the other woman.

a. As the court of appeals pointed out (Pet. App. 26a), the record shows that although they may have been elsewhere in the lounge at the time, the two women were never present at conversations between Rodas and petitioner concerning narcotics. Thus, neither woman was a material witness for either the prosecution or the defense, because the fact that Rodas met petitioner at his lounge was not in issue.

At petitioner's request, the prosecution produced "Georgie" and informed the defense that she had pleaded guilty to a narcotics conspiracy charge and was cooperating with the government. After interviewing "Georgie," the defense declined to call her as a witness (Pet. App. 25a). Nothing in the record indicated that the other woman, "Toni," had any relationship with the government, and the courts below accepted the government's representation that it had no control over her or any knowledge of her whereabouts (*ibid.*). Thus, the district court properly did not require the government to disclose her identity (Pet. App. 26a).[1]

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[1]Nor did the trial court err in refusing to instruct the jury that it could infer from the prosecution's failure to call the two women to testify that their testimony would have been adverse to the government. Since the testimony of the women would not have been material to any of the issues at trial, the court properly gave the following general instructions, to which petitioner did not object (Pet. App. 27a):

> [I]f it is specially within the power of the prosecution or defense to produce a witness who could give material testimony on an issue or to produce other evidence, the failure to call the witness may give rise to an inference that the evidence would be unfavorable.
>
> You cannot draw any such inference with regard to a witness or exhibit that is equally available to both parties or where the witness' testimony would be merely cumulative.

b. The decision whether to grant a continuance is within the discretion of the district court. See, *e.g.*, *Hemphill* v. *United States*, 392 F. 2d 45, 48-49 (C.A. 8), certiorari denied, 393 U.S. 877. As the court of appeals properly found (Pet. App. 25a-26a), petitioner did not show that Georgie's testimony would have aided his defense. Under these circumstances, the district court's refusal to grant a continuance was not reversible error. See *United States* v. *Conder*, 423 F. 2d 904, 908-909 (C.A. 6), certiorari denied *sub nom. Pegram* v. *United States*, 400 U.S. 958.[2]

3. Petitioner also contends (Pet. 32) that the trial court erred in admitting testimony of his conversation with D.E.A. agent Pinol, which occurred approximately one month after the narcotics transaction for which he was convicted. Evidence of other crimes, however,

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[2]*United States* v. *Baum*, 482 F. 2d 1325 (C.A. 2), upon which petitioner relies (Pet. 28-29), merely established that the defense was entitled to a continuance in order to prepare to meet the testimony of a crucial prosecution witness whose identity was not revealed until he testified. In this case, on the other hand, Georgie was not called as a government witness, and there is no indication that her testimony would be relevant to petitioner's guilt or innocence.

is admissible where, as here, such events are proximate in time to the charges at issue and are relevant to prove, *inter alia*, intent, motive or absence of mistake (Pet. App. 28a). See, *e.g.*, *Spencer* v. *Texas*, 385 U.S. 554, 560-562; *Sherman* v. *United States*, 356 U.S. 369, 375; *Nye & Nissen* v. *United States*, 336 U.S. 613, 618; Fed. R. Evidence 404(b). As the court of appeals correctly held (Pet. App. 28a), petitioner's conversation with Pinol was relevant to his intent to possess and distribute cocaine and was properly admitted under a limiting instruction that the jury could consider that evidence only "as bearing on [petitioner's] intention in connection with the March 25th charge."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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